NO. 82-2056

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

ESCONDIDO MUTUAL WATER COMPANY,
CITY OF ESCONDIDO
AND VISTA IRRIGATION DISTRICT,
PETITIONERS,

v.

LaJOLLA, RINCON, SAN PASQUAL, PAUMA and
PALA BANDS OF MISSION INDIANS,
AND THE SECRETARY OF INTERIOR
IN HIS CAPACITY AS TRUSTEE
FOR SAID BANDS,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE AMERICAN PUBLIC POWER ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MISCELLANEOUS

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LaJOLLA, RINCON, SAN PASQUAL, PAUMA and
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in his capacity as trustee
for said Bands,

Respondents.

On Petition for Writ of Certiorari
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BRIEF OF AMICUS CURIAE AMERICAN PUBLIC POWER ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Consent from counsel for all parties to the filing of this brief has been filed with the Clerk of this Court.

STATEMENT OF INTEREST OF
AMERICAN PUBLIC POWER ASSOCIATION

The American Public Power Association is a national service organization representing more than 1,750 municipal and state-owned electric utilities in 49 states. These publicly-owned systems have, since the inception of federal hydro licensing, made a significant contribution to the development of the Nation's hydro potential. Of the 634 Federal Energy Regulatory Commission ("FERC" or "Commission") major licenses issued over the past 63 years, 120 have been granted to public bodies.

Public systems continue to be interested in hydro development. Of the 627 pending applications for licenses or license amendments before the FERC, 90 have been submitted by public systems. Of the 1,258 permits outstanding as of March 31, 1983, 241 were issued to

public systems. Of the 651 preliminary permit applications pending, 106 were filed by public systems.

The hydro resources, both existing and potential, represented by the number of applications and licenses issued, constitute a valuable share of the power supply resources of the public systems. In addition, public systems frequently purchase all or a portion of their power supply from other electric systems that have developed hydroelectric resources. These hydro resources are not only non-polluting, renewable resources, but they also have operational characteristics that enhance their value to electric systems in terms of reliability.

Conflicts between use of land and water for power and other purposes are increasing, and will be a dominating factor in a large number of hydro

licensing and relicensing cases before the Commission. The statutory problem presented in this case has been raised several times in the last decade, and it is crucial that it be resolved with proper regard for Congressional intent and the structure of the Federal Power Act as a whole. The Ninth Circuit's decision, which overturns the FERC's longstanding construction of Section 4(e) of the Federal Power Act, 16 U.S.C. §797(e), permits interference with the relicensing of existing projects, and will distort and delay the future development of hydropower at existing and potential project sites. It will also distort and complicate ongoing procedures for the allocation of scarce water in the Western United States by allowing cabinet Secretaries to control, impede, and misuse FERC proceedings.

The position taken by the Office of the Solicitor General prevents the FERC from presenting to this Court its arguments concerning the harmful consequences of the Ninth Circuit's decision. Because of the effects which this decision will have on the course of subsequent FERC proceedings, the issues involved are not likely to again be presented for judicial review. For these reasons, APPA hereby prays that this Court issue a writ of certiorari and review the decision reached below.

REASONS FOR GRANTING CERTIORARI

I. THIS DECISION RESOLVES A CONFLICT OF EXTREME IMPORTANCE BETWEEN GOVERNMENTAL AGENCIES IN A FASHION WHICH WILL FRUSTRATE A PRIMARY STATUTORY OBJECTIVE IMPORTANT TO PUBLIC POLICY

This case arose from a disagreement between an independent regulatory agency and an executive department concerning the continued operation of a hydro-

electric project on federal reservation lands. It requires construction of the first proviso of Section 4(e) of the Federal Power Act, 16 U.S.C. §797(e) (1976): 1/

> Sec. 4. The Commission is hereby authorized and empowered -
>
> * * *
>
> (e) To issue licenses ... for the purpose of constructing, operating, and maintaining ... project works ... upon any part of the public lands and reservations of the United States ... except as herein provided:
>
> Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem

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1/ Prior to 1935, Section 4(e) of the Federal Power Act was Section 4(d) of the Federal Water Power Act of 1920, 49 Stat. 1840-41.

> necessary for the adequate protection and utilization of such reservation.

The Court of Appeals for the Ninth Circuit determined, based upon the purported plain meaning of the proviso, that the Commission must insert into any license issued within any Indian reservation all conditions stipulated by the Secretary of the Interior regardless of the Commission's judgment concerning the lawfulness, soundness, or wisdom of the conditions.

The Ninth Circuit's decision permits a cabinet Secretary to wreak havoc on Commission proceedings whenever federal reservation lands or reserved water rights, including groundwater rights, will, in the Secretary's sole judgment, be affected by a project. Most of the remaining sites for economically feasible development of hydroelec-

tricity are located at existing hydro developments or on lands near or within the 517 million acres of public lands withdrawn by the United States and subject to the Court of Appeals' decision. 2/ Of the potential new and incremental hydro capacity identified nationwide, about 75% is located within

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2/ See Comptroller General of the United States, Improvements Needed In Review of Public Land Withdrawals -- Land Set Aside For Special Purposes i (1979):

> About 517 million acres of our Nation's public lands have been "withdrawn" by Federal agencies. Generally, withdrawals are defined as statutory or administrative actions restricting or segregating public lands from settlement, entry, location, or disposal under some or all of the general land laws. Use of the land thereafter is limited to the specific purpose or purposes for which it was withdrawn.

Of this amount, Section 3(2) of the Federal Power Act excludes national monuments and national parks.

the Pacific Southwest and Pacific Northwest states. 3/

This Court granted a writ of certiorari in Chapman v. Federal Power Commission, 345 U.S. 153 (1953), to resolve a "conflict of view between two agencies of the government" the resolution of which would "affect a substantial number of important sites for the development of hydroelectric power." 4/ This case is equally worthy of certiorari, if not more so, inasmuch as the Ninth Circuit's decision threatens not only to impede the development of new projects but to interfere with the relicensing and continued operation of existing projects. Moreover, the case,

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3/ 2 U.S. Army Corps of Engineers, Preliminary Inventory of Hydropower Resources 8-9 (1979).

4/ Chapman, 345 U.S. at 155.

on its facts, involves what this Court has deemed one of the most critical problems in the Southwest United States today, the allocation of scarce water supplies. 5/ The Federal Power Act, properly construed, prescribes an orderly procedure for managing conflicts of the sort presented in this case. The Ninth Circuit's resolution will, as shown below, result in frustration of hydro development which is in the public interest and circumvention of appropriate procedures for the resolution of water rights disputes.

5/ See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 804 (1976).

II. THE NINTH CIRCUIT'S DECISION, DESPITE THE COURT'S DENIAL, ALLOWS A SECRETARY TO VETO THE ISSUANCE OF A LICENSE BY THE COMMISSION, CONTRARY TO THE ACT AND CONGRESSIONAL INTENT

A. The Ninth Circuit's Construction Of The Reservation Proviso Gives A Secretary Veto Power

The Ninth Circuit stated that it need not decide if a construction of the Federal Power Act which would enable Interior to unconditionally veto a license would be erroneous, on the ground that its construction of the first proviso of Section 4(e) did not have that effect. Appendix to Petition for Writ of Certiorari (App.) 24-25, 692 F.2d at 1235. The court reasoned that "[a]ny license issued by the Commission which includes conditions propounded by Interior will be subject to judicial review." App. 32-33, 701 F.2d at

827. 6/ This is no answer at all to the veto problem, for the effect of the court's decision is to allow the Secretary to assure that no license will be issued. The Commission cannot, consistent with its statutory responsibilities, issue a license containing conditions it believes unlawful, or conditions embodying findings of fact different from its own. The Ninth Circuit, by denying the Commission authority to exclude such conditions, has given the Secretary in question a "backdoor" veto. The facts of this case illustrate the problem clearly.

6/ The court suggested in its initial order, but abandoned in its order on rehearing, the notion that Interior's actions could themselves be challenged in federal district court under the Administrative Procedure Act, 5 U.S.C. §§701-706 (1976). App. 32-33, 701 F.2d at 827.

Section 4(e) of the Act provides that Secretarial conditions are to be contained in FERC licenses. Because, pursuant to Section 6 of the Act, the Commission prescribes all license conditions, Secretarial conditions must be reviewedp by the Commission. Section 6 also directs that all conditions shall be "in conformity with this Act." The Commission found several of Interior's conditions to be inconsistent with the Act 7/ and for that reason excluded them from the license. The Ninth Circuit never criticized the Commission's findings concerning those conditions, and it never discussed the conflict

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7/ The Commission so found with respect to Interior's conditions 5 (App. 149 & n.147, 6 F.E.R.C. at pp. 61,415, 61,487 n.147); 8 (App. 151-53 & n.150, 6 F.E.R.C. at pp. 61,415, 61,487 n.150); and 11 (App. 154-55 & n.156, 6 F.E.R.C. at pp. 61,417, 61,487 n.156).

between Section 6 and its interpretation of Section 4(e). It is plain that under Section 6 the Commission could never issue a license containing conditions it determined to be unlawful. 8/

Section 313(b) of the Act provides that the Commission's findings of fact, if supported by substantial evidence, "shall be conclusive." The first proviso of §4(e) requires the Commission to find, as a prerequisite to the issuance of a license within a reservation, that the license will not interfere or be inconsistent with the reservation's purpose. The Commission has long construed the Act to give it the power to override the determination of the concerned Secretary

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8/ The Commission cannot simply issue a license and rely on court review of conditions it believes unlawful. The Commission cannot appeal its own orders, so there may well be no judicial review.

on this point. 9/ Several of Interior's conditions would destroy the project favored by Commission on the ground that the Commission was incorrect and that the project favored by the Commission was inconsistent with the reservations' purposes. 10/ The court did not reconcile its construction of §4(e) with

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9/ See Pigeon River Lumber Co., 1 F.P.C. 206, 209 (1935) (Commission has "the sole power and duty" to make the required finding).

Acting FPC Chief Counsel James F. Lawson, who had been with the Commission since its first year, testified in 1930 that "The Commission now has power to override the head of a department as to the consistency of a license with the purpose of any reservation." Investigation of Federal Regulation of Power: Hearings Pursuant to S. Res. 80 and on S. 3619 Before the Senate Comm. on Interstate Commerce, 71st Cong., 2d Sess. 358 (1930) ("Senate Hearings").

10/ Initial Decision, 6 F.E.R.C. ¶63,008 at pp. 65,074-75. ("It is manifest the conditions were designed not to improve the project but to destroy it. The joint brief [of Interior and the Indian Bands] seems to confess as much.")

the Commission's fact finding supremacy, although the dissenting judge on rehearing argued that the conflict dictated rejection of that construction. 11/

B. The Court Below Improperly Dismissed Evidence Of Long-standing Administrative Practice And Congressional Acquiescence Indicating The Absence Of A Secretarial Veto

Longstanding administrative construction of a statute is due great weight, especially when Congressional failure to change the statute during re-enactment indicates acquiescence in the administrative construction. 12/ The history of the Act strongly supports the Commission's authority to overrule Secretarial attempts to thwart its licensing authority. The Ninth

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11/ App. 41, 701 F.2d at 831 (Anderson, J., dissenting)

12/ NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974).

Circuit's decision devotes only the briefest attention to historical materials, stating that "the Commission's vigorous historical argument cannot move us to ignore the fact that section 4(e) says, quite simply, that the license 'shall include' [sic] the conditions which the Secretary 'deems necessary.'" App. 23, 692 F.2d at 1234.

In 1930, Congress held hearings leading to the establishment of an independent FPC, during which it inquired into the authority of the Commission vis-a-vis the Departments of Agriculture, War and the Interior, the Secretaries of which then constituted the Commission. Former FPC Executive Secretary O. C. Merrill 13/ and

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13/ O.C. Merrill was a principal draftsman of the Federal Water Power Act of 1920, and he testified on behalf of

(footnote continued on following page)

Commissioners Hyde (the Secretary of Agriculture) and Wilbur (the Secretary of the Interior) were all closely questioned on the problem of conflicting authority. 14/ Merrill clearly indicated that the FPC had, and would have if reorganized as an independent commission, the final say on issuance of licenses, even on reservation lands. 15/

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the Secretaries of War, Agriculture, and the Interior in hearings preceding its passage. See United States v. Public Utilities Comm'n, 345 U.S. 295, 305 n. 10 (1953); Chemehuevi Tribe of Indians v. FPC, 420 U.S. 395, 418 n.24 (1975). He served as Executive Secretary, the highest ranking full time Commission official, from the FPC's founding until June 30, 1929.

14/ Acting FPC Chief Counsel Lawson's prepared testimony on this issue was cited supra at note 9.

15/ Merrill testified:

> In my opinion the best way to maintain the jurisdiction and interests

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Secretary Hyde testified that the Secretaries would not review licenses issued by an independent commission on reservation lands; he argued, and Secretary Wilbur expressly agreed, that departmental interests would be adequately protected through intervention

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> of three departments [when an independent commission is established] is to have the field work in so far as it relates to the issuance of licenses, originally handled as it has been ever since I have been with the Federal Power Commission, through the departments, leaving the final say to the Federal Power Commission. But the three departments have no final say in those matters.

Senate Hearings, supra note 9, at 280.

Questioning concerning conflicts between the Commission and the departments continued. Merrill observed:

> It came up at times while I was in the commission, and we took the position that the commission's decision was final.

Id. at 281.

in Commission licensing proceedings. 16/

16/ The following exchange, which plainly relates directly to Section 4(e), took place in the House hearings:

> Mr. Parks. Mr. Secretary, if this bill should become a law, how would you avoid duplication? For instance, every question of navigation must go back to the Secretary of War. The question of Indian lands or national parks must go back to the Secretary of the Interior. A question with respect to national forests must come back to yourself. Would it relieve you very much of any of the burdens if we should pass this bill?
>
> Secretary Hyde. It would relieve the Secretary, but not the Bureau of Forestry. The Bureau of Forestry, if an independent personnel is set up, and the Bureau of Forestry finds that any of the rights of the public in forest lands were in any wise jeopardized, of course, would have to go on that project in order to make a report of their own which they could present to the commission.

Federal Power Commission: Hearings on H.R. 11408 Before the House Comm. on Interstate and Foreign Commerce, 71st Cong., 2d Sess. 45-46 (1930).

Secretary Wilbur's testimony on the point was even clearer:

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Congress plainly understood the Commission's construction of the reservation proviso in 1930, which was then Agriculture's and Interior's as well. Congress' failure to change section 4(e) in the 1930 legislation, and the Commission's consistent construction of the provision, 17/ weigh heavily against

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> I agree with Secretary Hyde that we can well allow these departments to be represented at hearings before the Commission to present phases of departmental interest, rather than to have the control remain in the departments. Otherwise, even though you set up the Commission, you will leave in the hands of the Secretaries, or in the hands of the bureau heads, the power to negate whatever the commission may want to do . . . .

Id. at 48.

17/ Pigeon River Lumber Co., supra, 1 F.P.C. 206 (1935); Pacific Gas & Electric Co., 6 F.P.C. 729 (1947) (Because Secretary of Agriculture and California Fish and Game Division

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the Court of Appeals' contrary interpretation.

C. The Ninth Circuit's Simplistic "Plain Meaning" Construction Will Lead To A Procedural Morass

The Ninth Circuit's insistence that the Commission has no authority to issue a license without one or more of Interior's conditions is founded solely upon its determination that the phrase "shall be subject to and contain" is inherently mandatory. App. 23-25, 692

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proposed divergent conditions for fish protection within national forests, the Commission ruled that it would determine license conditions for that purpose at a later time "after considerations of the respective conditions of the Secretary of Agriculture, the Secretary of Interior, and the State of California," at 730); Pacific Gas & Electric Co., 53 F.P.C. 523 (1975) (Commission rejects Secretary of Agriculture's claim that it must include Agriculture's license conditions proffered to establish the adequate protection and utilization of a national forest).

F.2d at 1234-35. This is too simple a resolution of what the D.C. Circuit termed a difficult question of policy and statutory interpretation. 18/ Ninth Circuit precedent holds that "shall" may sometimes be directory only, depending upon context and legislative intent. 19/

The second proviso of section 4(e) of the Act plainly gives the Chief of

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18/ Swinomish Tribal Community v. FERC, 627 F.2d 499, 508 (D.C. Cir. 1980).

19/ United States v. Reeb, 433 F.2d 381, 383 (9th Cir. 1970). See also Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643 (1978); Commissioner v. Brown, 380 U.S. 563, 571 (1965); 2A Sands, Sutherland Statutory Construction §57.02 (1973) ("A not uncommon ambivalence between legislative intent and manifested statutory meaning as the applicable standard of decision appears in the statement [in In Re McQuiston's Adoption, 238 Pa. 304, 86 A. 205 (1913)] that 'whether a statute is mandatory or directory does not depend upon its form, but upon the intention of the legislature, to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other.'")

Engineers and the Secretary of the Army veto power over licenses affecting the navigable capacity of navigable waters; in such instances those officials must approve an applicant's plans before a license can issue. The first proviso, concerning reservations, contains no correlative language, but the Ninth Circuit, because of "plain meaning," gives Secretaries with jurisdiction over reservations the same power. If this Court does not review the decision below, the problems which this "plain meaning" construction will cause are predictable.

On remand, the Commission, unable to include Interior's conditions, would have no option except to deny the license application. 20/ If appealed,

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20/ This result is particularly absurd in the instant case, which involves

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the reviewing court would then have to evaluate the disagreements between the Commission and the Secretary in the abstract. The court would not have as a reference point a license order in which the Commission accepted, rejected or modified conditions recommended by the Secretary in question and supported its actions based on specific findings of fact that the licensed project, so conditioned, would not interfere or be inconsistent with any occupied reservation. Nor would the court have the benefit of the Commission's evaluation of how best to structure the

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relicensing of an existing project. Presumably the project will be operated indefinitely under nominally interim annual licenses issued pursuant to Section 15(a) of the Act, 16 U.S.C. §808(a), and the additional benefits provided by the Commission in its order will not be forthcoming for the Indians.

project to protect the public interest. 21/ Further, since there would be no positive action to affirm, an appellate decision could only result in a remand to the Commission. An uncooperative Secretary could then simply force yet another stalemate.

The Ninth Circuit contemplated the procedural problems its interpretation of the Act would entail, but in two attempts it did not succeed in finding a resolution. 22/ This Court may never

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21/ The Secretary's objections, as in this case, will most likely be more narrowly focused than the public interest considerations required of the Commission.

22/ In its first order, the court presumed that Secretarial action could be reviewed in district court under the Administrative Procedure Act, 5 U.S.C. §§701-706 (1970). App. 24-25, 692 F.2d at 1235. In its second order the court abandoned this presumption, relying on the appellate court's power to review conditions contained in licenses. App.

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again see a case dealing with this statutory problem which will not be muddied by the awkward procedural posture in which future cases may necessarily be presented. It is imperative, therefore, that this Court address this problem now, in the instant case.

III. THE DECISION BELOW SANCTIONS THE MISUSE OF LICENSING PROCEEDINGS TO ADJUDICATE WATER RIGHTS

At the heart of the dispute between Interior and the FERC was a conflict over the diversion of water from the vicinity of several Indian reservations

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33, 701 F.2d at 827. The latter reliance has two problems. One is that, as demonstrated, in many cases there will be issued no license for which conditions can be reviewed. Another is that a license that contains conditions which only the FERC objects to will never come before a court because the Commission plainly cannot appeal its own orders. Thus, the public interest, as perceived by the agency entrusted with its promotion, would lie undefended and indefensible.

to the vicinity of Escondido. The Commission determined that Escondido had made a satisfactory showing under §9(b) of the Act that it had authority under California law to operate the project, including the diversion of the water. Interior asserted that the Indians had superior water rights pursuant to the Winters doctrine 23/ and urged the Commission to rule accordingly. The Commission refused to allow its proceedings to be used as a forum for suits to try title for property or water rights, 24/ and noted the federal district court litigation of the

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23/ Winters v. United States, 207 U.S. 564 (1908).

24/ The Commission has historically resisted such attempts on the ground that it lacks jurisdiction to settle such disputes. See Compliance With State Laws, 2d Ann. Rept. of the FPC 224 (1922); Niagara Falls Power Co., 1 F.P.C. 716 (1938); Seneca Nation of Indians, 6 F.P.C. 1025 (1947).

Escondido-Indian Bands water rights that has been ongoing since 1969. The Commission inserted a condition in the Escondido license allowing for any appropriate modification following the final resolution on the water rights question. 25/

In stark contrast to the Commission's deference to the district court proceeding, Interior's proposed condition 4 26/ would essentially resolve the water rights question in the Indians' favor. The Commission believed that Interior was attempting to circumvent the water rights litigation by seeking through the licensing proceeding to destroy any water rights

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25/ App. 107-08, 259, 6 F.E.R.C. at pp. 61,399, 61,463.

26/ App. 148 n.146, 6 F.E.R.C. at pp. 61,486-87 n.146.

that Escondido might have had. 27/ In another licensing proceeding before the Commission at the same time, Interior decided to press a tribal water rights claim before the Commission in lieu of initiating any court litigation. 28/

The Commission resisted what it viewed as abusive practices by Interior in the instant proceeding by rejecting Interior's conditions proposed for Escondido's application. The Ninth Circuit's construction of §4(e) denies the Commission any authority to prevent such misuse of its proceedings.

Interior's role in these proceedings is to advocate the Indians'

27/ Initial Decision, 6 F.E.R.C. at p. 65,073; see also App. 100, 6 F.E.R.C. at pp. 61,396-97.

28/ Southern Cal. Edison Co., 23 F.E.R.C. ¶61,240, pp. 61,512-513 (1983), reh'g denied, 24 F.E.R.C. ¶61,119 (July 22, 1983).

interest and take their side. For this reason, as this Court recently decided, 29/ a tribunal should not be bound by the unadjudicated water rights claims made by Interior on behalf of the Indians it represents. The Ninth Circuit's decision puts Interior, rather than the Commission charged with seeking the broad public interest (consistent with the purpose of any occupied reservation), in control of the issuance of a hydroelectric license. As the record of this proceeding demonstrates, this is contrary to the statute, likely to lead to an abuse of the FERC's orderly process, and constitutes gross error.

The scope of the problem is magnified tremendously by the fact that certain of the water rights at issue in

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29/ Arizona v. California, 103 S. Ct. 1382, 1402 n.28, 75 L. Ed. 2d 318, 346 n.28 (1983).

this proceeding are rights to groundwater. The problems involved in applying the Winters doctrine to reserved water rights appurtenant to Indian reservations are monstrous, and the precedents miniscule. 30/ Plainly hydro licensing proceedings are not the place for resolution of reserved groundwater rights disputes. If they were, then the Secretaries of Agriculture and Interior would be in a position, by virtue of the appeals court's ruling, to require nearly every significant hydro project

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30/ This Court extended the Winters doctrine to include reservation of groundwater in Cappaert v. United States, 426 U.S. 128 (1976). Cappaert involved an unusually simple factual setting, and the Court acknowledged, but did not resolve, the problems which a more complex set of facts could pose. Id. at 143 n.7. In Cappaert both the level of groundwater reserved and the source of the depletion of the groundwater were well-defined. Neither question will be easily resolved in a case concerning reserved Indian groundwater rights.

in the Western United States to conform to their special interests through the Secretarial authority to insert conditions in proposed FERC licenses. If the disposition of water rights is one of these interests, the possibility of resolving these water rights in an orderly fashion becomes increasingly elusive.

The costs to new hydro power development, to the best use of public lands, and to the federal government in the form of annual charges 31/ can easily become enormously high as multiple fora and rulings become entangled, and result in blocking both the ultimate allocation

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31/ The United States government collects annual charges for the use of tribal and government lands for hydro power purposes, pursuant to Section 17 of the Act. The tribes are credited with their charges; the other charges are earmarked for special uses or go to the state in which the project is located.

of water rights and the prompt development of new hydro potential.

IV. THE COURT'S CONSTRUCTION OF THE PHRASE "WITHIN ANY RESERVATION" IS CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE AND EXTENDS THE SCOPE OF SECRETARIAL POWER SO AS TO JEOPARDIZE THE COMMISSION'S LICENSING AUTHORITY

A. The Court Below Misconstrued The Phrase "Within Any Reservation" To Include Reservation Lands With No Project Works

The Court of Appeals determined that, even though the project works licensed by the Commission were not located on three of the six reservations at issue, the Commission was required to adopt the license conditions which the Secretary deemed necessary to protect the three reservations on which no project works were located because water rights allegedly appurtenant to those reservations might be affected by the project. App. 25-28, 692 F.2d at 1235-37. Because there has never been any adjudicative

decision establishing the water rights associated with the three reservations with no project works, the decision apparently holds that a license is issued "within a reservation" any time a cabinet Secretary asserts that reserved water rights would be affected. As noted, supra, such a holding invites abuses. 32/

The decision below dramatically expands the role of the Secretary of the Interior in the issuance of licenses for hydroelectric projects under Part I of the Federal Power Act because the language of the first proviso of Section 4(e) limits the Secretary's direct participation to cases in which the project works are located "within any reservation" (emphasis added). The

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32/ See Arizona v. California, 103 S. Ct. 1382, 1402 n.28, 75 L. Ed. 2d 318, 346 n.28 (1983).

court below refused to accept the normal definition and use of the word "within." Instead, it rejected as "perverse and illogical" the interpretation which would have limited the operation of the first proviso to Section 4(e) to those reservations in which the project works to be licensed were physically located. App. 26-28, 692 F.2d at 1236-37. The Ninth Circuit effectively revised the language "within any reservation" to read "affecting any reservation." Id. The Ninth Circuit's revision is contrary to the language of and disrupts the balanced regulatory scheme established by both Section 4(e) and the broad public interest criterion of Section 10(a). Both plain meaning in the context of Section 4(e) and the statutory framework argue against the appellate court's interpretation. The court's construction of "within any

reservation" relies on three necessary conclusions, each of which is erroneous: that the term "reservation" as defined in Section 3(2) of the Act includes water rights appurtenant to reservation lands; that the phrase "within any reservation" is ambiguous; and that the first proviso of Section 4(e) was written to protect Indians.

Section 3(2) of the Federal Power Act defines "reservations" to include "tribal lands embraced within Indian reservations" as well as other government "lands and interests in lands." The court concludes that, because water rights are interests in land, they are included in "reservations." App. 25-26, 692 F.2d at 1235-36. However, the Act itself indicates that such a generous construction of "reservation" is unwarranted. "Project" is defined in Section 3(11) to include "all water

rights, ... lands, or interests in lands the use or occupancy of which are necessary or appropriate in the maintenance" of a "unit of improvement or development." "Water rights" are listed separately from "interests in lands," indicating that they are not included in the broader term.

Because of its construction of "reservation," the court found the term "within the reservation" ambiguous. App. 26-27; 692 F.2d at 1236. On the contrary, the statute is clear and could not be made to bear the Ninth Circuit's interpretation without major alteration. Section 4(e) authorizes the Commission to "issue licenses ... for the purpose of constructing, operating and maintaining ... project works ... upon any part of the public lands and reservations of the United States ... Provided, That licenses shall be issued within any

reservation only ..." [emphasis added]. The statutory language can bear the Ninth CIrcuit's construction only if one accepts the nonsensical proposition that project works 33/ can be owned, operated or maintained upon, and indeed within, water rights. A project may include water rights, but the term "project," as distinguished from "project works," appears nowhere in Section 4(e). The Ninth Circuit sought to introduce ambiguity into §4(e) with its construction of "reservations," but in fact the clarity of §4(e) demonstrates the error of construing "reservations" to include water rights. It is also noteworthy that the second proviso of §4(e) concerns licenses "affecting the navigable capacity of any

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33/ Project works are defined in Section 3(12) as "the physical structures of a project."

navigable waters of the United States," and Section 23(b) contains the phrase "if no public lands or reservations are affected." The Act is drafted broadly where breadth is intended, and it is erroneous to read "within any reservation" to mean "affecting any reservation."

Having strained to find the phrase "within any reservation" ambiguous, the court construes it to include water rights because it is in a statutory clause passed for the benefit of dependent Indian tribes. App. 27, 692 F.2d at 1236. The court finds this conclusion "obvious," but it is hardly so. Given the broad definition of "reservations," which includes national forests, military reservations, and "also lands and interests in lands acquired and held for any public purposes," it is difficult to read the

first proviso of §4(e) as other than a provision designed to protect the many facets of the public interest implicated in the Government's various activities. Of the many licensed projects within "reservations", only 15 are on Indian reservations.

B. Contrary To The Ninth Circuit's Ruling, the Commission's Construction Of Section 4(e) Would Not Lead To Absurd Results.

The Ninth Circuit held that it was necessary to reach its construction of 4(e) because of the potential danger of devastating a reservation. Thus, the court felt it necessary to protect the reservations through an expansive reading of the first proviso of Section 4(e). The court ignored the fact that the Commission has the obligation under Section 10(a) of the Act to ensure that the project adopted:

> will be best adapted to a comprehensive plan for improving

> or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses ....

This Court has interpreted Sections 4 and 10 of the Act as making the Commission "the guardian of the public domain." Federal Power Commission v. Idaho Power Company, 344 U.S. 17, 23 (1952). In evaluating a project proposal, the Commission would thus be required to consider the adverse impact of a project on any affected reservation. Any failure by the Commission to carry out its duty would be subject to traditional and orderly appeal.

C. The Extension Of The Domain Of Secretarial Veto Power Is Plainly Improper

The strained logic of the Ninth Circuit's construction of "within any reservation" to include "affecting any water rights" is troubling, but the

consequences of that construction, when combined with the Ninth Circuit's "plain meaning" construction of the first proviso, is alarming. The power of a Secretary to block the licensing or relicensing of hydro projects is extended immensely. Projects tens or hundreds of miles from any Indian reservation, national forest, or other reservation may arguably affect water rights, particularly groundwater rights, appurtenant to the reservations. The major project in the Western United States that will not be subject to Secretarial veto under the Ninth Circuit's decision will surely be the exception, rather than the rule. There is nothing in the language or history of the Act to sanction this result.

CONCLUSION

The Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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